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IN THE

Supreme Court of the United States

No.

October Term, 1947

JOHN MELLON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

LOUIS HALLE,
Counsel for Petitioner.

EDWARD HALLE,
On the Brief.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, John Mellon, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, made in a per curiam opinion, on December 15, 1947, affirming a judgment of conviction of the District Court for the Eastern District of New York convicting petitioner of a violation of Title 18, U. S. Code, Sec. 72.

Sentence of two years imprisonment was imposed, execution thereof suspended and petitioner was placed on probation for a period of five years.

Petition for rehearing was duly filed in the Circuit Court of Appeals which was denied without opinion on January 7, 1948. The time for filing this petition was enlarged to March 5, 1948, by order of this Court dated January 29, 1948.

A.

Statement of the Case

The petitioner, John Mellon, and one Alfred Salerno, were indicted jointly in an indictment containing seven counts. The first six counts were substantive counts alleging violations in furnishing forged bail bonds for a Michael Pecoraro (Counts One, Three and Five) and a Sam Gross (Counts Two, Four and Six). Count Seven was a conspiracy count alleging that the defendants conspired to furnish forged bail bonds for the mentioned individuals.

At the opening of the trial, the Assistant United States Attorney's motion to sever as against Salerno was granted (f. 94). At the close of the Government's case, petitioner's counsel moved to dismiss all the counts of the indictment and asked for a directed verdict of acquittal. The Court thereupon granted the petitioner's motion as to Counts Two, Four and Six which related to furnishing the bond for Sam Gross on the ground that there was no proof connecting the petitioner with that bond (ff. 302; 304-307).

The case went to the jury on Counts One, Three, Five and Seven and the jury returned verdicts of guilty on all four of the said counts (ff. 503; 504).

The Court, on its own motion, then directed a judgment of acquittal as to Counts Three, Five and Seven (f. 525), after the Assistant District Attorney moved for a judgment of acquittal as to the said counts on the ground that the Government failed to sustain its burden of proof with regard thereto (f. 517). These counts alleged that Salerno was the person who actually forged the bonds (ff. 53; 54; 64-66; 76-80; 85; 86).

Of the original seven counts, therefore, only Count One, upon which the petitioner was sentenced, remains for the consideration of this Court.

Count One charges a violation of Title 18, U. S. C. A., Sec. 72. The substance of this count is that the petitioner and one Salerno, aiding, abetting and counseling each other, on or about the 20th day of February, 1940, forged and caused to be forged a certain bond (guaranteeing the appearance in court of Michael Pecoraro) and that the petitioner and Salerno forged and counselled to be forged and caused to be forged the signature "Charles D. Martineau", a necessary and material part of the said bond, for the purpose of defrauding the United States, contrary to Statute (ff. 18-36).

Exhibit 2, upon which Count One of the indictment is based, is an appeal bond in the sum of $3,000, guaranteeing the appearance of Michael Pecoraro before the District Court of the United States for the Eastern District of New York, upon notification of filing of the Mandate of the United States Circuit Court of Appeals, and that he abide by and perform any judgments which might be rendered and surrender himself when required. This bond is signed by Michael Pecoraro as principal and Charles D. Martineau as surety, and was acknowledged before United States Commissioner Edward E. Fay, on the 20th day of February, 1940. On the reverse side of the exhibit is an affidavit of Charles D. Martineau, as surety, stating that he is the owner of real estate at No. 56-58 South 9 Street, Brooklyn, N. Y. (Exhibit 2). The said bond was produced by John Scott, a Deputy Clerk of the Criminal Division of the United States District Court for the Eastern District of New York, who testified for the Government (ff. 102-107).

This bond was fixed by order of Judge Moscowitz of the District Court on February 20th, 1940 (ff. 118; 119). Deputy

Clerk Scott, however, did not know whether Gross and Pecoraro were released on bail pending appeal. He did presume that they were (f. 108). There is no direct evidence in the record that either Gross or Pecoraro were released on bail.

Commissioner Edward E. Fay, who testified for the Government, stated that he had no present recollection of the Charles D. Martineau who appeared before him on February 20th, 1940, and executed the bond, Government Exhibit 2 (f. 125). However, he testified that it was the usual procedure to ask the individual making the bond if the facts set forth in the bond are true and that he did so in this case (ff. 127; 128).

The petitioner, John Mellon, and one George LaFante owned jointly the property at 56-58 South 9 Street, Brooklyn, N. Y., which they had purchased from the New York State Superintendent of Insurance in July, 1939 (ff. 325-330; 133-138). LaFante also used the name Charles D. Martineau in 1940 (ff. 132; 133) and at the time that title to this property is relevant to this case, during February, 1940, while the property was owned jointly by Mellon and LaFante, the deed was in the name of Charles D. Martineau (f. 137).

On February 13, 1940, both the petitioner and LaFante were incarcerated in the Tombs Prison, 102 Centre Street, in the City of New York on a charge unrelated to this case (ff. 339-343). Petitioner left the Tombs about three months after he was arrested (f. 360). A lawyer by the name of Jackman, who represented them, visited them in jail about a week after their arrest, and stated in the presence of LaFante that a friend of Pecoraro's wanted to know if the petitioner would make bail for him by putting up the property as collateral (f. 403). Petitioner then stated to Jackman that he was willing and that LaFante was willing

and that they agreed (ff. 343-349). There was no conversation about being paid for this collateral (ff. 351; 352). Petitioner did not give either the deed or the tax bill to the property to Jackman on the occasion of his visit to the jail, nor did he give him any instructions as to the writing of a bail bond (ff. 355; 356). Petitioner did not sign any papers in connection with these bail bonds (ff. 366; 367). Jackman was to receive an interest in this property as his attorney's fee for representing petitioner and LaFante (f. 392) and he received all of the papers relating to it from the police on or about February 20, 1940, after petitioner's mentioned arrest (ff. 414, 415).

Later, on or about December 14, 1944, the petitioner, who was then on parole, reported to the office of the parole board according to parole routine (ff. 242; 367; 368). He was examined again on December 18, 1944 (f. 244). It is fairly definite that on the second date Mr. Feldman, the parole officer, and the petitioner were the only ones present (f. 244), but there is some confusion as to who was present on the 14th and as to what the petitioner said at that time.

Mr. Bernard Simmons, Feldman's superior (f. 368), stated that he was present at an interview of the petitioner, that Feldman was also present, but makes no mention that anyone else was present, and although he was present during the entire interview he heard no mention concerning the property or the bonds of Pecoraro or Gross (ff. 232-240).

Mr. Feldman testified that on December 14, Mr. Ralph Lewis of the Federal Bureau of Investigation was present (f. 247) along with Mr. Simmons, the petitioner and himself (f. 246), and that petitioner said he felt that the Federal Government would catch up with him in regard to forgery of a bail bond (f. 247). He stated that petitioner was not willing to discuss the subject further unless he was guaranteed a short sentence (f. 248).

Mr. Ralph Lewis of the F.B.I., testified that petitioner told him in December, 1944, that he had made arrangements with a man to take the deed and tax receipts and forge the name Charles D. Martineau to the necessary papers to arrange bond for Pecoraro, and that petitioner told him that these arrangements were made *before February 13, 1940* (ff. 264; 272; 273). On the 18th of December, 1944, Lewis was not present (f. 251), but Feldman testified that petitioner told him on that date that he had furnished bond for Pecoraro and had used the name Martineau (f. 248).

Petitioner, in his defense, testified that although he did tell the officers that he was the owner of the property, and that he authorized its use as collateral for the bond, he did not say to either Feldman, Lewis or anyone else that he made arrangements for the forging of the bond (f. 369). All he wanted to know at that time was, if it could be shown that he was connected with this bond in any way—if it could cause him to go back to states prison on his parole; and he was advised that it wouldn't (ff. 371-373). He denied that he ever gave any instructions or aided or abetted in making arrangements for the furnishing of a bond for Pecoraro (ff. 356; 362-364).

It should be noted that officer Lewis voluntarily corrected his testimony to say that at no time did petitioner use the word "forgery" during his interrogation (ff. 448, 449).

George LaFante's testimony is not illuminating. It reveals that he did not remember any fact concerning the year 1940 with any particularity. The only facts that he was apparently positive about were that he used the name Martineau (f. 133) and that he did not authorize anyone to sign the name Martineau on the bond (f. 143). He did however identify the following as being written by himself:

"March 26, 1945

To whom it may concern:

The property on So 9th St. in Brooklyn was purchased by me for Mr. J. H. Mellon.

I had $400.00 invested in it, and it was purchased in an assumed name.

Anything that J. H. Mellon did with it or wanted to do with said property was alright with me.

GEORGE LAFANTE" (Deft. Ex. C).

The Indictment which was found on February 14, 1945 (ff. 2; 486) charged the offense was committed on February 20, 1940 (f. 18). The trial was begun on October 14, 1946 (f. 92).

Summary of Evidence against Petitioner

Corpus delicti for the crime was sought to be established by placing the bond (Govt. Ex. 2) in evidence, and by establishing that LaFante (Martinau) did not sign or authorize anyone to sign the name Martinau to it. There is no evidence as to who actually signed the bond, or who presented it before the commissioner. In this connection Count One recites Martinau as an alias of the defendant Salerno, and Count Three and Count Five charge that Salerno was the active agent in presenting the bond and making certain false statements, and that Salerno as Martinau was aided, directed, etc., by Mellon. Salerno, however, was not a witness on the trial.

Assuming, *arguendo*, that it was properly established that the bond in question was forged, the only evidence connect-

ing petitioner with such forgery is the testimony of his alleged statements against interest.

It is submitted that (1) the statements against interest did not amount to a confession of the crime charged in Count One of the indictment and (2) the corpus delicti was not established. The argument for these propositions appears more fully in Points I and II of the brief submitted herewith.

B.

The Questions Presented

The following questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals.

(1) Did the Government prove the Commission by petitioner of the offense charged in Count One of the indictment?

(2) Was it reversible error to deny petitioner's motion to dismiss Count One of the indictment on the ground that proof thereof by petitioner's uncorroborated alleged confessions was insufficient?

(3) Was reversible error committed in the failure to dismiss Count One of the indictment when the Court dismissed Counts Three, Five and Seven, for lack of proof, the jury having found verdicts of guilty on all four Counts, after deliberating thereon upon instruction of the Court?

C.

Reasons Relied on for the Allowance of the Writ

In the decision sought to be reviewed, the Circuit Court of Appeals has affirmed a judgment of conviction by the District Court where the record of the trial contains no evidence to support such conviction. It is indeed strange enough in itself that of a grand total of seven Counts, concerning the alleged forgery of two bail bonds, the trial court refused to permit three to go to the jury because of lack of proof, and as to the four remaining, dismissed an additional three for lack of proof, even after the jury returned verdicts of guilty thereon. The fact that the jury did find verdicts of guilty on them shows a basis of error for the verdict of guilty on Count One, for which it is contended by petitioner no proof existed. The task of the jury, who are laymen, is difficult enough when their deliberation concern Counts for which they have heard proof. However, when they are called upon to deliberate on four Counts, three of which had no proof in evidence on which to deliberate, their confusion is patent when the verdict returned is guilty, on all four Counts. It is to be presumed, therefore, that the verdict of guilty on all four Counts was the result of a misapprehension as to duty, rather than valid deliberations. Such action does not reflect proper trial procedure.

The Trial Judge himself must have had misgivings even as to the lack of proof for Count One, which he did not dismiss, since he suspended sentence on the petitioner, a third offender (ff. 323-325; 526; 527).

This conviction is a most serious one and not merely of academic interest (*Fiswick* v. *U. S.*, 329 U. S. 211, 67 S. Ct. 224). It brands the petitioner as a third offender and sub-

jects him to a mandatory sentence of life imprisonment upon being convicted of a fourth offense in New York State, where petitioner resides, if it is allowed to stand.

In view of the indicated lack of proof in the entire trial by the dismissal of six Counts out of seven, the verdict of guilty manifestly against the weight of credible evidence on at least three of the four Counts sent to the jury, and the seriousness of the consequences to the petitioner, this Honorable Court should grant certiorari and exercise its supervisory jurisdiction herein.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

Dated: February 26th, 1948.

JOHN MELLON
Petitioner

By

LOUIS HALLE
Counsel for Petitioner

IN THE

Supreme Court of the United States

No.

October Term, 1947

JOHN MELLON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

ARGUMENT

POINT I

The Government wholly failed to prove the commission by the appellant of the offense charged in Count One.

As stated, this count alleges that on February 20, 1940, the petitioner arranged for and aided and abetted a person to use the name of Charles D. Martineau and to execute in that name a bond on appeal in the sum of $3,000 on behalf of Michael Pecoraro upon an appeal taken by him from a judgment of conviction entered in the District Court.

To prove this charge the Government introduced the testimony of Lewis and Feldman, as mentioned, as to the alleged confession by the appellant.

Feldman's testimony fixes no date when petitioner said the bond was executed but Lewis' testimony is to the effect

that petitioner told him it occurred *prior to February 13, 1940* (ff. 273; 288-289). "Definitely prior to February 13th" (f. 289).

Lewis' testimony, therefore, as to said alleged confession, can in no way relate to the bond executed on February 20th, 1940, and can in no manner be competent as proof as to the subject matter of Count One.

In other words, the indictment is limited to the specific bond on appeal, executed on February 20th, 1940, as set out in Count One thereof. Said Count One does not charge the defendants named therein with any agreement to do anything in the future.

The question therefore presents itself: Could the defendants named in said Count One have aided, abetted, and counseled each other, on or before February 13th, 1940, to forge this particular bond which was executed on February 20th, 1940, when the record of the trial discloses that the order allowing Pecoraro on bail pending his appeal, and the amount thereof, was not made before February 20th, 1940 (ff. 118; 119).

On February 13th Pecoraro had not yet been sentenced. He was sentenced on February 14th (f. 292). Pecoraro was not under arrest to be released on his giving bail, he was in custody on a judgment of conviction. At that time no bail was allowed or fixed by the court.

The most that could be said for the evidence is that the petitioner knew, prior to February 13th, that Pecoraro was convicted and awaiting sentence and that he, appellant, wanted to arrange for Pecoraro's release on bail.

But a very important element is lacking: Did the petitioner, prior to February 13th, have the power to commit the offense of aiding, abetting and counselling the forging of the $3,000 bond set out in Count One of the indictment? How could he carry through prior to the time when the

order allowing the bail and fixing the amount was made by the court?

In the case of *People* v. *Jaffe*, 185 N. Y. 497, 500, the Court states, in referring to the defendant:

> "He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact."

At page 501 the Court further stated:

> "* * * The crime of which the defendant was convicted necessarily consists of three elements: first, the act; second, the intent; and third, the knowledge of an existing condition. There was proof tending to establish two of these elements, the first and second, but none to establish the existence of the third. This was knowledge of the stolen character of the property sought to be acquired. There could be no such knowledge. The defendant could not know that the property possessed the character of stolen property when it had not in fact been acquired by theft."

In the case at bar, regardless of the petitioner's guilty intent, he could not have committed the crime charged on or about February 20th. Whatever the petitioner did prior to February 13th, could not have been towards forging the bond executed on February 20th, for the reason that on the 13th of February, or prior thereto, the petitioner could not have been charged with knowing that an order would be made on the 20th, allowing the bail and fixing the amount.

In moving to dismiss the motion was also made on the ground that there was no proof connecting the petitioner with the bond mentioned in Count One (f. 302), and the learned Court below obviously erred in denying it (f. 312).

POINT II

In any event, the conviction should be set aside because it is based entirely on appellant's alleged confession, which was uncorroborated.

The Courts in the United States have adopted a fixed rule that corroboration of a confession is necessary and there can be no conviction of an accused in a criminal case upon an uncorroborated confession.

> *Daeche* v. *United States,* 250 Fed. 566, C. C. A. 2;
> *Forte* v. *United States,* 94 Fed. 2d 236, C. C. A. Dist. Col., citing *Daeche* v. *United States.*

And such corroboration is not sufficient if it tends merely to support the confession, without substantial independent evidence (*Forte* v. *United States, supra*).

This Court held in the *Daeche* case (p. 571) that "some sort of corroboration of a confession is necessary to conviction * * * ".

See also,

> *United States* v. *Warszower,* 113 Fed. 2d, 100, C. C. A. 2, affd. 312, U. S. 342.

The Government failed to establish the *corpus delicti* by competent proof in that there was no proof to establish beyond a reasonable doubt that the signature "Charles D. Martineau" on the bond (Gov. Ex. 2) was a forgery. The various Counts of the indictment charge that Salerno's alias was Charles D. Martineau (ff. 17; 37; 49; 55; 62; 67; 73). LaFante testified that he used the name Martineau

in 1940 and that he held the property under that assumed name (f. 133). However, he stated in writing that he held the property under that name for petitioner, and that anything petitioner did with it was approved by him (Def. Ex. C). Therefore, assuming that petitioner directed Salerno to deal with the property as Martineau, that Salerno was also known as Martineau, and that he signed the name Martineau, the result is that he did what he had a perfect right to do and that no forgery in fact was committed. The testimony of LaFante that he did not sign, or authorize anyone to sign, the bond with the name Martineau is of no effect, since he admitted he held it for petitioner and he also affirmed that anything petitioner did with it was alright with him. The burden is on the Government to establish that the bond was forged. This burden is not sustained by the type of evidence introduced at the trial.

In the final analysis there is no testimony by any of the witnesses to show who signed the bond and that the person who signed was not in fact what he represented himself to be or that he was unauthorized to act as he did.

The Government utterly failed to meet this basic requirement. The motion to dismiss, made on this ground (ff. 301, 302) should have been granted and it was error to deny it (f. 312).

POINT III

The trial court committed reversible error in allowing Counts Three, Five and Seven to go to the jury when it was patent that no evidence in proof thereof had been established by the Government.

The three mentioned Counts all allege that one Salerno actually forged the appeal bond. The Government severed as to Salerno at the outset of the trial (f. 94). He did not appear as a witness. No witness identified him as the signatory of the bond (no one knew who signed the bond), and no documentary evidence mentioned his name. It was perfectly clear, after the defendant rested, that Counts Three, Five and Seven were devoid of evidentiary support and remained bare allegations in the indictment. To burden the jury with these Counts was most prejudicial to petitioner. This is borne out by the request of the jury to the Court to furnish further instructions as to the various Counts (f. 491). The Court thereupon instructed as to each Count:

As to Count Three:

> "That is to say, the said bond falsely and fraudulently represented that Salerno was Martinau and falsely represented that he, the defendant, was Charles D. Martinau, the owner of the real estate 56-58 South 9th Street, valued at $15,000, subject to a mortgage of $3,650, whereas in truth and in fact, as the defendants then and there well knew, the defendant Salerno was not Martinau and he did not own the real estate in question" (f. 496).

As to Count Five:

"* * * that he, Salerno, with several aliases, would depose and certify truly, and that the defendant Salerno did, wilfully and contrary to said oath, falsely state a material matter which he knew to be untrue: to wit, that he, Salerno, was the owner of the real estate 56-58 South 9th Street, whereas in truth and in fact the defendant knew that he was not the owner of that property, and that he did not believe himself to be the owner of the said property" (ff. 497; 498).

As to Count Seven:

"* * * did conspire and agree to cause Salerno, with aliases, to falsely execute the name of Martinau deposing that he was the owner of the property 56-58 South 9th Street, and to falsely represent that Salerno was Martinau, the owner of the property, which was alleged to be valued at $15,000 subject to mortgage, whereas the defendants knew that that was untrue. That is what it means—all this verbiage—and that defendant then and there conspired and agreed to unlawfully, wilfully, knowingly and feloniously cause to be taken an oath by the defendant Salerno before the United States Commissioner Fay, in which there would be certified truly under oath a material fact, namely, that he was the owner of that property, whereas the defendants knew that he was not the owner, the purpose and plan of the conspiracy being that the defendants themselves and divers other persons whose names are to the Grand Jury unknown, caused Salerno to appear before the Commissioner and represent him to be Martinau and to be the owner of the property at 56-58 South 9th Street,

> valued at $15,000 subject to a $3,650 mortgage, and that he did execute or cause to be executed an appeal bond in the case of the United States v. Pecoraro and that 'the following overt acts were committed' " (ff. 499-501).

The Court thereupon instructed as to the conspiracy that none of the overt acts charged in the indictment were proved, but the Court did state unequivocally that:

> "If the Government proves that one or more steps were taken, although they are not the steps alleged in the indictment, nonetheless the Government has made out its case of a conspiracy—if it proves one or more overt acts to have been committed and that proof is beyond a reasonable doubt" (f. 502).

This charge was given even though it was apparent that no overt act of any conspiracy alleged in the indictment was proved by the Government.

Of course the error as to these three Counts was cured by their dismissal after verdict of guilty. But the most grave error, the effect of these Counts, to the prejudice of the petitioner as to Count One, on the deliberation of the jury remained. In view of the paucity of evidence on the entire trial, even as to Count One, the submission of all four Counts to the jury was reversible error.

CONCLUSION

It is respectfully submitted that this is a case which deserves review by this Honorable Court in the exercise of its supervisory power over federal criminal prosecutions under the rule of *McNabb* v. *United States*, 318 U. S. 332, 63 S. Ct. 608.

Respectfully submitted,

LOUIS HALLE,
Counsel for Petitioner.

EDWARD HALLE,
On the Brief.